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August 7, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, SW
Washington, DC 20554

Re: Reply Comments in CC Docket No. 96-98 and CC Docket No. 99-68

Dear Ms. Salas:

On August 4, 2000, Time Warner Telecom Inc. ("TWTC") filed its reply comments in the above-referenced dockets. However, the incorrect version of the reply comments was inadvertently filed with the Commission. TWTC is hereby filing the corrected version of its reply comments.

Please contact me if you have any questions.

Sincerely,

Christi Shewman

Christi Shewman

Enclosure

Washington, DC
New York
Paris
London

CORRECTED VERSION

TIME WARNER TELECOM

Please substitute this set in its
Entirety for
Time Warner Telecom's
Reply Comments filed
August 4, 2000

RECEIVED

AUG 7 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

REPLY COMMENTS OF TIME WARNER TELECOM

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ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS INC.

August 7, 2000

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WASHINGTON, D.C.

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REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom ("TWTC"), by its attorneys, hereby files these reply comments in the proceeding initiated by the Public Notice released on June 23, 2000 by the Commission in the above-captioned proceedings.

I. INTRODUCTION AND SUMMARY

Reciprocal compensation illustrates profoundly the insight that highly regulated firms like the ILECs invest too much in influencing regulatory outcomes and not enough in improving efficiency and innovation. The ILECs have gone to almost absurd lengths to try to game the rules governing the exchange of traffic in their favor. They began long before the passage of the 1996 Act, charging cellular carriers as much as three cents per minute for the exchange of traffic. When the 1996 Act was implemented, they mocked the CLEC request for bill and keep, labeled by Bell Atlantic, in a now infamous phrase, as "bilk and keep." Figuring that CLECs needed to terminate traffic more on their networks than vice versa, and no doubt salivating at the prospect of another cellular-like boondoggle, the ILECs successfully importuned regulators to set reciprocal compensation prices far above any reasonable estimation of forward-looking cost (in most cases 4 times above their current levels).

New entrants then did what new entrants do -- they entered to serve customers with the highest margins. In many cases this meant ISPs. The CLECs realized that the ISPs had been chronically neglected by the ILECs, denied collocation rights, and generally discriminated against in favor of the ILEC affiliated ISPs. The ISPs probably would have switched to CLECs anyway. But at least some CLECs responded to the especially strong allure of above-cost reciprocal compensation rates. They also introduced significant efficiencies, such as allowing ISPs the right to collocate near CLEC switches, and generally provided ISPs with customer service far superior to the ILECs.

Rather than try to win back the ISPs, many of which were actually paying ISDN PRI prices to CLECs in the same range as the ILECs' tariffed offerings, the ILECs did what they do best: they sought to change the regulations. They begged and cajoled regulators to put a stop to the so-called reciprocal compensation "gravy train," claiming that they were being forced to helplessly stand by while CLECs absconded with millions of dollars of ill-gotten gains. They succeeded in convincing the Commission to adopt a literalist construction of Section 251(b)(5) which was so flawed that it could not even survive the highly deferential standard for reviews of agency constructions of ambiguous statutory terms. In the meantime, state regulators began the hard work of lowering reciprocal compensation to forward-looking ILEC costs and ordered the ILECs to pay that rate for the exchange of ISP-bound calls.

Undeterred, the ILECs are now back at the Commission in this remand proceeding posing as standard-bearers for efficient competition and as champions of the intent of Congress in passing the 1996 Act. But their true goal is to convince the Commission to adopt legal and policy arguments that will undermine competition and further entrench their market power. They have asked the Commission to eliminate reciprocal compensation for ISP customers even though termination of ISP-bound traffic imposes costs on LECs that serve ISPs and even though ISP-bound traffic is highly imbalanced in favor of termination.

The Commission must reject this absurd proposal, and establish a viable framework for local competition for ISPs. First, it should rule that the term "termination" in Section 251(b)(5) is a term of art meaning the delivery of calls to a non-carrier party. It should reject the ILECs' attempts to resuscitate the end-to-end analysis as applicable to Section 251(b)(5), because that analysis would lead to the insupportable result that no compensation would be due for the exchange of ISP-bound traffic, it would be inconsistent with the fact that ISP-bound traffic is telephone exchange service, and it would be inconsistent with the end user status of ISPs.

Furthermore, the Commission should reject the ILECs' meritless policy arguments in favor of abandoning reciprocal compensation of any kind for ISP-bound traffic. In a declaration attached as an exhibit to these reply comments, Don Wood, an analyst with extensive experience in analyzing telecommunications carrier costs as well as regulatory issues, provides a comprehensive refutation to the ILECs' arguments. As Mr. Wood explains, while the ILECs complain in nearly endless diatribes that reciprocal compensation causes inefficient behavior, this is simply wrong. Only reciprocal compensation rates that are not based on forward-looking costs result in inefficient behavior. Most importantly, there is no evidence to support the ILECs' assertions that reciprocal compensation based on ILEC forward-looking costs exceeds CLEC terminating costs. The only situations where this might be the case is with firms that have entered solely to game the regulatory process. These outliers should not be the basis for eliminating competition for ISP customers; they should instead be eliminated from reciprocal compensation entirely by appropriate state action.

More generally, the Commission must recognize that the ILECs' assertions regarding CLEC business practices are empty and misleading rhetoric. The ILECs imply that CLECs serving ISPs have no interest in building networks or in serving other customers. This is simply wrong. TWTC, for example, is a facilities-based provider that targets the full array of business customers in the cities in which it operates. Only approximately ten percent of TWTC's customers are ISPs. Those ISPs pay TWTC ISDN PRI prices that are very close to the ILEC prices. But ISPs subscribe to TWTC service because TWTC provides superior service quality. TWTC cannot continue to do so, however, if it is not compensated for the costs it incurs in terminating traffic to its ISP customers.

In sum, the exchange of ISP-bound traffic should be priced at a level that encourages marketplace competition. ILECs must be forced to win ISPs back by investing in improved customer service and innovation, not by investing in lawyers and lobbyists.

II. THE ILECS PROVIDE NO LEGAL BASIS FOR ELIMINATING RECIPROCAL COMPENSATION FROM THE EXCHANGE OF ISP-BOUND TRAFFIC.

In its initial comments, TWTC explained that the Commission should construe the word "termination" in Section 251(b)(5) as a term of art, consistent with industry usage, meaning delivery of a call to a non-carrier party. This termination functionality has no bearing on the end point of the call for jurisdictional purposes. In the case of reciprocal compensation, as the D.C. Circuit concluded, an ISP is the "called party" when a subscriber establishes a dial-up connection. Thus, when an ISP subscriber calls an ISP within the same local calling area, reciprocal compensation should apply. This approach is consistent with the D.C. Circuit's opinion, the end user status of ISPs, and the Commission's definition of termination is Section 51.701(d) of its rules.

In their comments, the ILECs offer an array of legal arguments to try to support the elimination of compensation for the transport and termination of ISP-bound traffic. None of these arguments has merit.

A. The End-To-End Analysis Should Not Be Used To Determine The Termination Point Of ISP-Bound Traffic.

The D.C. Circuit held that the Commission had not provided an adequate explanation as to why it was reasonable to apply the end-to-end analysis to determine the point of termination for Section 251(b)(5) purposes. Bell Atlantic v FCC, 206 F.3d 1, 8 (D.C. Cir. 2000). The ILECs now all assert that the D.C. Circuit was unduly concerned about the application of the end-to-end analysis in this context, since the Commission has in the past applied that analysis in cases involving information service providers and even to determine regulatory issues other than jurisdiction. See USTA White Paper at 8-10; Verizon Comments at 8-9; Qwest Comments at 3-5, 9. But these cases cannot bear the burden the ILECs ask of them.

As a preliminary matter, the issue in this proceeding is not whether the Commission can apply the end-to-end analysis to determine the jurisdiction of telecommunications comprised of both a telecommunications service (the local service connection between the ISP subscriber and the ISP) and an information service (the connection to the Internet). It clearly may. The question here is whether that methodology should be used to determine whether telecommunications terminates for purposes of reciprocal compensation. Indeed, as the D.C. Circuit stated, "[e]ven if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation." Bell Atlantic v. FCC, 206 F.3d at 6.

Furthermore, although the Commission has in the past applied the end-to-end analysis for purposes other than determining jurisdiction (such as whether access charges apply), that hardly makes it reasonable to apply that analysis to reciprocal compensation under the 1996 Act. A construction of a statutory provision, although conceivable in a vacuum, must be rejected if it is inconsistent with legislative intent or leads to absurd results.[1] This is clearly the case here.

There are only two available intercarrier compensation mechanisms available for ISP-bound traffic: reciprocal compensation and access charges. The Commission has construed Section 251(b)(5) to apply only to local traffic and has held that ISPs do not pay access. Given this context, it would be absurd and contrary to congressional intent to apply the end-to-end analysis to determine which traffic is subject to reciprocal compensation. This is because the end-to-end analysis would classify ISP-bound traffic as non-local, thus precluding intercarrier compensation and preventing competition for serving ISPs. It is simply implausible to conclude that Congress intended that the 1996 Act would leave out of its competitive scheme a large category of customers such as ISPs.

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1 See United States v. Bryan, 339 U.S. 323, 338 (1950); Lange v. United States, 443 F.2d 720, 722-23 (D.C. Cir. 1971) ("The literal wording of the statute is a primary index but not the sole index to legislative intent. It cannot prevail over strong contrary indications in the legislative history or so as to command an absurd result.").

The ILECs' construction of Section 251(b)(5) is highly reminiscent of the long distance carriers' attempt to construe that same provision as replacing the interstate access charge regime. The pre-1996 Act definition of "access service" is strikingly similar to the language of Section 251(b)(5). It is as follows:

> *Access Service* includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication.

47 C.F.R. § 69.2(b). Section 251(b)(5) covers the "transport and termination of telecommunications" and therefore could have been read to subsume and replace the regulatory "access service" definition. In the 1996 local competition proceeding, the long distance carriers argued for just this interpretation. But the ILECs argued, and the Commission agreed, that such a construction of Section 251(b)(5) would lead to the absurd result of eviscerating overnight the interstate access charge regime.[2] In the instant proceeding, the ILECs are now proposing a construction of Section 251(b)(5) that leads to equally absurd results (the elimination of any compensation for the exchange of ISP-bound traffic), but ones that benefit the ILECs. This is hardly a reason to accept the ILECs' argument.

Furthermore, in the pre-1996 Act access cases cited by the ILECs, the Commission was not applying its definition of Section

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2 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) (Local Competition Order).

251(b)(5) "termination" -- "the delivery of [local] traffic to the called party's premises." 47 C.F.R. § 51.701(d). If the Commission had meant to incorporate the end-to-end jurisdictional analysis used in the pre-1996 access charge cases into the term "termination" it could have said so. But it wisely did not. The "delivery" of a call to the "called party's premises" is appropriately flexible terminology, which allows the Commission to apply the term termination in a reasonable way given the goals of the 1996 Act and given that the 1996 Act is "in many important respects a model of ambiguity or indeed even self-contradiction." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999). Clearly, a rigid application of the end-to-end approach to determine the meaning of "termination" would prevent this result.

The Commission must also reject SBC's assertion that "section 51.701(d) of the Commission's rules does not purport to define which calls are subject to reciprocal compensation" but rather "merely gives a definition of 'termination' that pertains to whatever traffic is local and hence subject to reciprocal compensation." SBC Comments at 20. Courts grant regulatory agencies heightened discretion when construing their own rules.[3] The Commission should use this discretion to clarify that its definition of termination dictates the point of termination, not merely the functionalities to be considered when setting the price for transport and termination. Indeed, any other

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3 See Capital Network System, Inc. v. FCC, 28 F.3d 201, 206 (D.C. Cir. 1994).

construction of this rule could again lead to absurd results. If the point of termination is reached using network facilities other than those listed in the definition of termination, there could well be a disconnect between termination prices and the actual termination functions performed. Prices would not be based on cost -- precisely the problem that the ILECs complain about so strenuously in this proceeding.[4]

Nor should the Commission rely on its analysis in the Advanced Services Remand Order, as the ILECs suggest, in this proceeding.[5] In that case, as in the Declaratory Ruling, the Commission relied on the end-to-end analysis to determine whether traffic is local or long distance.[6] But in so doing, the

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4 TWTC's construction of "termination" does not mean that the use of that term in the definition of "exchange access" codified in the 1996 Act overturns the pre-1996 Act cases in which the Commission applied the end-to-end analysis to determine whether access charges applied. The definition of "termination" adopted by the Commission in the reciprocal compensation context could easily be applied in the access context to reach the same results as were reached in the pre-1996 Act access charge context. In other words, the Commission has the discretion to determine who is the "called party" in any given case (although it must obviously be consistent). In many, if not most, cases the point of delivery of traffic to the "called party" will also be the end point for jurisdictional purposes. But this should not be the case where this equivalence would lead to absurd results that run counter to the goals of the 1996 Act.

5 See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, 15 FCC Rcd 385 (1999) (Advanced Services Remand Order).

6 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (Declaratory Ruling).

Commission held that "exchange access," which is the provision of services and facilities "for the purpose of origination and termination of telephone toll service" includes ISP-bound traffic. It reached this conclusion based on the fact that ISPs purchase underlying toll service over which their information services travel. Advanced Services Remand Order, ¶ 36. But the Commission has stated that telecommunications service (of which telephone toll traffic is an example) and information service are mutually exclusive classifications. See Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, ¶ 59 (1998). A communication cannot be telecommunications service and information service at the same time, and a LEC cannot terminate telecommunications service and information service at the same time. ISP-bound traffic is unquestionably an information service. The Commission therefore incorrectly (as the ILECs themselves argued before the Commission and are now arguing on appeal) found that ISP-bound traffic can be access in the Advanced Services Remand Order.

Importantly, the Commission's incorrect conclusion in this regard was largely dictated by its conclusion in the Declaratory Ruling that the end-to-end analysis must be applied and that ISP-bound traffic is therefore not local traffic. After the Declaratory Ruling, the Commission had no choice but to find a way to classify as exchange access ISP-bound traffic that is destined for points beyond the ISP. Otherwise, Section 251(c) obligations might not apply to advanced services. The D.C. Circuit has now vacated the Declaratory Ruling, and strongly indicated that the Commission can conclude that interstate ISP-bound traffic may be local for purposes of reciprocal compensation. The Advanced Service Remand Order can therefore be revisited. The Commission can classify xDSL services carrying traffic to ISPs as local without losing jurisdiction over those services and without causing havoc in the competitive market for dial-up connections to ISPs. The Commission should do so.

Finally, the ILECs are also wrong when they assert that failure to apply the end-to-end analysis to reciprocal compensation will result in a violation of Section 201. See SBC Comments at 13. Section 251(i) states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." The ILECs argue that subjecting the exchange of ISP-bound traffic to reciprocal compensation would give the states the right to set final rates for the exchange of ISP-bound traffic, thus limiting the FCC's authority under Section 201 in violation of Section 251(i). But ever since it classified ISPs as users of telecommunications service rather than providers of those services, the Commission has allowed states to set the prices applicable to traffic carried between ISPs and their subscribers. This has always been understood to be a necessary and fully permissible consequence of the end user status of enhanced/information service providers. See Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 542-543 (8th Cir. 1998). Applying Section 251(b)(5) to the exchange of ISP-bound traffic would merely apply this approach to the situation where two LECs combine to deliver traffic to ISPs. As has always been the case, however, the Commission would retain the authority to classify ISPs as carriers subject to carrier access charges. In this way it could exclude interstate ISP-bound traffic from reciprocal compensation if it wished to eliminate any state role in regulating that traffic.

B. ISP-Bound Traffic Is Telephone Exchange Service.

Several parties in this proceeding argue that it does not matter whether the Commission classifies ISP-bound traffic as telephone exchange service, exchange access or any other type of traffic, since the key issue in this proceeding is the "termination" point of ISP-bound traffic. But this is incorrect. Under the relevant statutory and regulatory definitions, all traffic that "terminates" within the local exchange and constitutes telephone exchange service must also be local for reciprocal compensation purposes.

The Commission has conceded that ISP-bound traffic must either be telephone exchange service or exchange access service. See Bell Atlantic v. FCC, 206 F.3d at 8. As explained, ISP-bound traffic cannot be exchange access. On the other hand, ISP-bound traffic fits comfortably within the definition of telephone exchange service. That definition speaks in terms of "intercommunicating service" -- the ability of each subscriber to reach the other subscriber -- within a local calling area or "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). As TWTC explained in its comments, service purchased by ISP subscribers and ISPs out of state local telephone service tariff offerings provides just this kind of intercommunicating service. See TWTC Comments at 11.

Furthermore, the term "termination" is used in the definition of telephone exchange service, exchange access and in Section 251(b)(5). The Commission is bound by the presumption that it must construe this term in all of these closely related statutory provisions in a manner that is consistent and reasonable.[7] The way in which the point of "termination" is determined under the definition of "telephone exchange service" must, for example, be consistent with the way in which the point of "termination" is determined under the definition of reciprocal compensation.

Telephone exchange service and local service for reciprocal compensation purposes both include only calls that originate and terminate within the same local calling area. As mentioned, the definition of telephone exchange service is intercommunicating service "within a telephone exchange" or "comparable service" by which subscribers "can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). Thus, telephone exchange service provides the ability to originate and

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[7] See Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1343 (D.C. Cir. 1999).

terminate traffic within the same local calling area. Similarly, telecommunications traffic "that originates and terminates within a local exchange area" is "local" for reciprocal compensation purposes under Section 51.701(b)(1) of the Commission's rules.

Again, termination must be construed in a consistent fashion. It follows, that if a call terminates at a point that qualifies it as a telephone exchange service call, it also constitutes a local call for reciprocal compensation purposes. That is, if ISP-bound traffic is telephone exchange service, it must be local for purposes of reciprocal compensation.

C. Failure To Apply Reciprocal Compensation To The Exchange Of ISP-Bound Traffic Is Inconsistent With The End User Status Of ISPs.

The ILECs' strained attempts to make their proposed non-local treatment of ISP-bound traffic consistent with the end user status of ISPs are also meritless.

To begin with, the ILECs assert that the Commission has only classified ISPs as end users for access purposes and that there is no reason why they could not be treated differently in the reciprocal compensation context. In fact, however, the Commission has treated ISPs (like all information service providers) as end user, non-carriers in every relevant respect. ISPs do not pay universal service fees;[8] they do not pay carrier

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[8] See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, ¶ 788 (1997) ("Furthermore, we agree with the Joint Board that information service providers (ISP) and enhanced service providers are not required to contribute to support mechanisms to the extent they provide such services.").

access charges and are otherwise not subject to common carrier regulation;[9] and they do not have the rights of telecommunications carriers under Section 251.[10] It would therefore constitute a dramatic departure from Commission precedent to treat ISPs as something other than end users for reciprocal compensation purposes.

Moreover, ILEC attempts to fit calls to ISPs into the access charge model -- in which the LEC handing traffic to the IXC pays the LEC serving the end user -- rather than the reciprocal compensation model -- in which the LEC terminating traffic to the ISP is compensated for the cost of this service by the originating LEC -- are simply inconsistent with the broader regulatory treatment of ISPs. As the Commission has explained,

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9 See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, First Report and Order, 12 FCC Rcd 15982, ¶ 345 (1997) (Access Charge Order).

10 See Local Competition Order, at ¶ 995 ("In addition, we conclude that enhanced service providers that do not also provide domestic or international telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251.").

The fact that the Commission has classified ISPs as end users for *all* purposes should resolve the matter. Nevertheless, the ILECs' attempts to show that ISPs are not just like other business users are unconvincing. Qwest, for example, asserts that ISPs are different from other business customers because "the calls that ISPs receive are not simply incidental to the services they provide; rather they are an integral part of the very product the ISP is providing." Qwest Comments at 9. But this could also be said of the service offered by credit card verification systems and bank account information services. See Bell Atlantic v. FCC, 206 F.3d at 7. That such services are offered by firms that also sell other services seems hardly a basis for distinction.

there are two possible scenarios in which local carriers exchange traffic:

> Access charges were developed to address a situation in which three carriers -- typically, the originating LEC, the IXC, and the terminating LEC -- collaborate to complete a long distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call.

Local Competition Order, ¶ 1034. There should be no question that the exchange of ISP-bound traffic falls within the reciprocal compensation model. Local rates paid by ISP subscribers are set at a level to ensure recovery of all subscriber-originated calls to telephone numbers within the local calling area. This includes calls to ISPs. It is for this reason that the costs associated with interstate ISP-bound dial-up connections are allocated to the intrastate jurisdiction. Declaratory Ruling, ¶ 23. In this situation, it makes sense for the originating LEC to pay the terminating LEC because the originating LEC has already received payment for originating and terminating the call. The terminating LEC is unable, as a practical matter, to recover the costs of transport and termination from its subscriber because doing so would result in that LEC charging rates above competitive levels.

ILEC arguments to the contrary are easily rejected. First, the ILECs assert in conclusory fashion that ISP-bound traffic must be access because it is part of a larger interstate communication. See USTA White Paper at 11. But this argument ignores the fact that, as the D.C. Circuit recognized, termination in Section 251(b)(5) is not necessarily the jurisdictional end point.

Nor is the ILEC argument that ISP-bound traffic resembles Feature Group A traffic any more convincing. See USTA White Paper at 11; Qwest Comments at 11. Feature Group A, and all other forms of interstate access, are very different from the local call scenario described above. The costs incurred by an ILEC to deliver traffic to the purchaser of an interstate access service (including Feature Group A) are not allocated to the intrastate jurisdiction and are not recovered by the local service charge. They are allocated to the interstate jurisdiction and recovered from the IXC, the purchaser of the interstate access service. Where a LEC provides the interstate access service, the access purchaser pays the LEC with whom it has a customer relationship for the cost of carrying the traffic. It therefore makes sense that the LEC with a customer relationship with the access purchaser should split its access revenues with a LEC serving the access purchaser's customer. But, as explained, this kind of intercarrier payment system is not appropriate for ISP-bound traffic.

The ILECs also cannot explain away the FCC's reliance on the technical differences between long distance carriers and ISPs as one of the bases for treating ISPs as end users. The ILECs emphasize that in the Access Charge Order passage relied upon by the D.C. Circuit, the Commission merely stated that "it is not clear" that ISPs and long distance carriers use the network in the same way. But the ILECs gloss over the fact that the Commission subsequently convinced the Eighth Circuit Court of Appeals that the continued treatment of ISPs as end users rather than purchasers of access was reasonable based in large measure on the fact that ISPs utilize local networks differently than IXCs do. See Southwestern Bell Tel. Co. v. FCC, 153 F.3d at 542-544. The Commission may not now reach a different conclusion without conducting a comprehensive review of the ISP business, something that is certainly not appropriate in this proceeding.

III. THE ILECS FAIL TO PROVIDE A POLICY BASIS FOR ELIMINATING RECIPROCAL COMPENSATION FROM THE EXCHANGE OF ISP-BOUND TRAFFIC

The ILECs are as weak on public policy as they are on the law. While they offer an array of overstated and generally irrelevant public policy arguments, none of them can change the fundamental realities of ISP-bound traffic. That traffic is carried over the same facilities as other circuit-switched traffic. Terminating LECs unquestionably incur incremental costs when delivering traffic to ISP customers. There is every reason to believe that those costs are in line with forward-looking cost estimates for circuit-switched traffic. When the terminating LEC performs termination on behalf of an originating LEC, it must be compensated for that service because otherwise the originating LEC will experience a windfall in the form of avoided terminating costs and, more importantly, the terminating LEC will not be able to serve ISPs. Therefore, the same reciprocal compensation rates that apply to all other circuit-switched local traffic should also apply to the exchange of ISP-bound traffic.

Notwithstanding these simple and dispositive facts, the ILECs argue that applying reciprocal compensation to the exchange of ISP-bound traffic is bad policy. They argue that reciprocal compensation should not apply at all to ISP-bound traffic or, as a proxy, that it should not apply to any traffic beyond certain ratios of traffic imbalance (e.g., 2:1). The ILECs justify the complete or virtual prohibition on reciprocal compensation for ISP-bound traffic based on their assertions that (1) it is one-way traffic, (2) the costs of terminating ISP-bound traffic are lower than other traffic, especially for CLECs, (3) CLECs do not need reciprocal compensation because they should and can recover their transport and termination costs from ISPs, (4) it reduces competition for residential customers, (5) it reduces incentives of CLECs and ISPs to deploy advanced services, (6) it gives CLECs and ISPs the incentive to engage in inefficient regulatory "scams," (7) it causes irrational pricing schemes, (8) it prevents ILECs from serving ISPs, even when they are more efficient, (9) it leads to undesirable changes in local rate levels and structures, and (10) application of reciprocal compensation could undermine the U.S. positions taken before the International Telecommunications Union ("ITU"). These arguments are far more numerous than credible. In fact, each is easily rejected.

First, SBC argues that the theory behind reciprocal compensation, that end users only pay for traffic that they originate but not traffic they receive, does not apply to ISPs because ISPs only receive traffic. SBC Comments at 29. ISPs only purchase termination service, so the argument goes, and therefore the terminating carrier must be recovering the costs of termination from its ISP customer. But this is simply not correct. ISPs generally subscribe to business lines, including ISDN PRI lines. The price of these lines includes a flat monthly charge to cover the non-usage sensitive cost of connecting the ISP to the LEC's switch and a usage-based charge for calls originated by the customer. Unless they originate traffic, ISPs pay CLECs only the flat charge which covers the fixed costs of the connection to the CLEC switch. The flat monthly charges do not cover the incremental cost of terminating traffic to the ISP (or indeed originating traffic -- those are recovered through usage-based rates).[11] Reciprocal compensation must therefore be paid for the termination function.

Second, the ILECs claim that CLEC costs in terminating ISP-bound traffic are lower than even true forward-looking reciprocal compensation rates for all circuit-switched traffic. See, e.g., Verizon Comments at 22-27, Taylor Dec. at ¶¶ 24-35; SBC Comments at 32-37. But as explained in the attached Declaration by Don

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[11] For the same reason, SBC's reliance on the Commission's statement in the Access Charge Order (at ¶ 346) that ILECs can recover costs associated with ISP traffic from ISPs is misplaced. The Commission did not mean that ILECs recover the usage sensitive costs of carrying ISP-bound traffic from ISPs, but rather the cost of establishing ISP-to-switch connections. Thus, the Access Charge Order cannot be read, as SBC asserts, to justify the elimination of reciprocal compensation for ISP-bound traffic.